AH SAN

v.

MAJLIS BANDARAYA IPOH

HIGH COURT MALAYA, IPOH
VT SINGHAM J
[ORIGINATING SUMMONS NO: 24-462-2004]
27 JULY 2005

ADMINISTRATIVE LAW: *Remedies - Mandamus - Application made pursuant to s. 44(1) of Specific Relief Act 1950 - Whether leave of court required - Rules of the High Court 1980, O. 53 r. 1(1) & (3)*

ADMINISTRATIVE LAW: *Remedies - Mandamus - Delay - Filing application five and a half years from date of submitting Form E for Certificate of Fitness For Occupation to Majlis Bandaraya Ipoh - Whether plaintiff guilty of inordinate delay*

LIMITATION: *Public authorities - Public Authorities Protection Act 1948 - Whether applicable - Whether application for order of mandamus caught by limitation under s. 2(1) of the Public Authorities Protection Act 1948 - Whether plaintiff barred from filing application - Street, Drainage and Building Act 1974, s. 25(1)*

ADMINISTRATIVE LAW: *Remedies - Mandamus - Application for - Failure to make full and candid disclosure of material facts - Whether a ground for refusing relief sought*

PUBLIC AUTHORITY: *Local authority - Application for Certificate of Fitness For Occupation - Uniform Building By Laws 1974, by-law 7(1)(a) & (3) - Whether complied with*

ADMINISTRATIVE LAW: *Remedies - Mandamus - Order of mandamus against defendant to issue Certificate of Fitness For Occupation - Application for - Totality of facts and circumstances considered - Whether appropriate to grant relief sought*

By an originating summons dated 6 April 2004 (encl. 1), the plaintiff, *inter alia*, applied for an order of *mandamus* against Majlis Bandaraya, Ipoh (the defendant), pursuant to s. 44(1) of the Specific Relief Act 1950 to issue the Certificate of Fitness For Occupation ('CFO') to the plaintiff's shop building. The plaintiff was the registered owner of a shop lot and had submitted her building plans to the defendant for approval to rebuild her shop. On

24 September 1996, the plaintiff's plans were approved by the defendant. However, the 'lane reserve' adjacent to the plaintiff's land was alienated by the State Authority to Angkasamas Sdn Bhd ('the adjoining land owner') and on 24 December 1996 the defendant had approved the building plans by the adjoining land owner. The plaintiff filed Civil Suit No. 22-88-97 ('the said suit') at the High Court and an application for an injunction against the adjoining landowner from proceeding to put up a building on their land. The High Court dismissed the plaintiff's application for injunction and the said decision was confirmed by the Court of Appeal and Federal Court. The construction of the plaintiff's shop was completed in February of 1998 and subsequently, on 14 October 1998, one Yap Boon Foh on behalf of the plaintiff, had applied for the CFO ('exh. AS1'). It was the plaintiff's argument that although her shop had been built according to the approved plans, the defendant had rejected the application for CFO and as a result of the said decision, the plaintiff had suffered loss and damages. Hence, the said application in enc. 1. In answer to the plaintiff's said application (encl. 1) and affidavit in support (encl. 2), the defendant averred that the plaintiff, before commencing construction on her building, knew that it would cause problems to the adjoining landowner and that her building plan permission needed modification. The defendant argued that the plaintiff was aware of the adjoining landowner's rights but chose to ignore it and proceeded at her own peril to complete construction. The defendant contended that in the circumstances, the plaintiff should not be entitled to the prayer for Certificate of Fitness for Occupation as the plaintiff chose to act to her detriment without due regard for the rights of the adjoining owner. Further, the defendant submitted that the allegations by the plaintiff that the latter had properly submitted an application for CFO was misconceived.

Held (dismissing encl. 1):

[1] The application for an order of *mandamus* was not properly made as no leave had been obtained as provided under O. 53 r. 3 of the Rules of the High Court 1980. (See O. 53 r. 1(1), (3) of the Rules of the High Court 1980 and s. 25 read with para.1 of the Schedule to the Courts of Judicature Act 1964). The relief sought by the plaintiff was a substantive relief under the Specific Relief Act 1950 but however the leave was to be obtained which was clearly spelt out in O. 53 r. 1(1) and (3) of the Rules of the High Court 1980 was procedural in nature and must be so construed and not mixed up. (p 487 a-d)

[2] The plaintiff had filed this application for order of *mandamus* on 6 April 2004, about five and a half years later from the date of submitting the application Form E dated 14 October 1998 (exh. 'AS1') as attached to her affidavit (encl. 2) to the defendant. The plaintiff did not explain or disclose all the material circumstances which had resulted in the delay. The plaintiff was guilty of inordinate delay in filing this application for *mandamus* and the latter ought to be dismissed on this score of unexplained delay alone. (p 488 e-h)

[3] In order to determine whether the application was caught by limitation under s. 2(1) of the Public Authorities Protection Act 1948, time shall start from the time the defendant had failed to consider the application Form E dated 14 October 1998 (exh. AS1 of encl. 2). Upon considering the date as stated in the application Form E and the provisions of s. 25(1) of the Street, Drainage and Building Act 1974, the court found that the application was caught by the three years limitation period under s. 2(a) of the Public Authorities Protection Act 1948 and the plaintiff was barred from filing this application. (p 489 b-d)

[4] The plaintiff had failed to disclose to this court of the Civil Suit No. 22-88-97 filed at the High Court Ipoh against the defendant, the Majlis Perbandaran and others in respect of the same subject matter of the land wherein the plaintiff's application for injunction against the registered owners of the adjoining land and its contractors from proceeding with the construction of the shop building on the land was dismissed by the High Court on 18 July 1997 and subsequently confirmed by the Court of Appeal on 19 January 1998 and remained uncontradicted. The plaintiff had acted inequitably and with impunity and on the facts, she was not a person in whose favour this court ought to strain the jurisdiction that has been invoked. There has been unconscionable conduct on the part of the plaintiff. (pp 489 h-i & 490 a-b)

[5] The plaintiff had failed to disclose to this court that her application for modification of the proposed construction of the building on her land was rejected by a letter dated 29 April 1997 by the architect of the defendant. Failure to make on oath a full and candid disclosure of material facts is of itself a ground for refusing the relief sought. It was undesirable that the court should consider the plaintiff's application for an order of *mandamus* without knowing the facts on which it was based. (p 490 d-f)

[6] In considering the background, facts and circumstances of the case which was canvassed at the High Court Ipoh during the hearing of the application for injunction in Civil Suit No. 22-88-97 and clearly explained in the judgment of the High Court and confirmed by the Court of Appeal, the plaintiff still chose to file this application without having disclosed to this court the decision of the Court of Appeal which had a bearing and was directly relevant for the decision of this court in this application. (p 491 b-c)

[7] The plaintiff in applying for the order of *mandamus* must show utmost good faith and disclose all the relevant matters that would affect the court's decision either to grant or refuse the application for an order of *mandamus.* A court where it exercises equitable jurisdiction is a court of conscience and on the facts in the instant case, there was no reason for making the slightest concession in the plaintiff's favour. (p 491 d)

[8] The plaintiff had failed to comply with by-law 7 of the Uniform Building By-Laws 1984 and the onus was on her to have informed the defendant of the change or substitution of the architect. No evidence was ever submitted to the defendant of the circumstances seeing the substitution. Further, when by-law 7(3) is read together with by-law 7(1)(a), it was clear that there can be no substitution without the agreement/consent of the defendant. (p 491 e)

[9] On the totality of the facts, background and circumstances, it was not appropriate to grant the relief sought by the plaintiff being an order of *mandamus* against the defendant to issue the Certificate of Fitness pursuant to the application Form E under the Uniform Building By-Laws 1984. (p 493 a)

Case(s) referred to:

Abdul Malik Abdul Majid v. Asnah Hamid & Anor and Dagang Bachik v. Abdul Malik Majid [1985] 2 MLJ 459 ***(foll)***

Ah San v. Majlis Bandaraya Ipoh & Ors [2000] 2 CLJ 125 CA ***(foll)***

Ahmad Tajuddin Hj Ishak v. Suruhanjaya Pelabuhan Pulau Pinang [1997] 2 CLJ 225 CA ***(refd)***

Alloy Automotive Sdn Bhd v. Perusahaan Iron Field Sdn Bhd [1986] 1 MLJ 382 ***(foll)***

Alor Janggus Soon Seng Trading Sdn Bhd Building Ors v. Sey Hoe Sdn Bhd & Ors [1995] 1 CLJ 461 SC ***(foll)***

Attorney-General of Hongkong v. Ng Yuen Shiu [1983] 2 AC 629 ***(refd)***

Barraclough v. Brown [1897] AC 613 ***(refd)***

Bencon Development Sdn Bhd v. Majlis Perbandaran Pulau Pinang [1999] 8 CLJ 37 HC ***(refd)***

Carl-Zeiss-in Stiftung v. Herbert Smith & Co [1968] 2 All ER 1002 ***(refd)***

Chan Mun Poy v. Director of Telecomunication & Anor [1981] 2 MLJ 293 ***(foll)***

Corporative Retail Services Ltd v. Secretary of States for the Environment [1980] All ER 449 ***(foll)***

Dawkins v. Prince Adward of Saxe of Wemar [1975-76] 1 QBD 499 ***(foll)***

Erlanger v. New Sombrero 3 App Case 1218 ***(refd)***

Everscript Snack Product (M) Sdn Bhd & Anor v. Sweeties Food Industries Sdn Bhd [1980] 2 MLJ 297 ***(refd)***

Faber Merlin (M) Sdn Bhd & Ors v. Lye Thai Seng & Anor [1985] 2 MLJ 280 ***(refd)***

Habib Syed Mahmud lwn. Datuk Patinggi Hj Mohd Taib Mahmud & Anor [1986] 2 MLJ 198 ***(refd)***

Holl & Co Ltd v. Shoreham by-sea Urban District Council [1964] 1 WLR 240 ***(refd)***

Jatindra Mohan Sen Gupta - In re [1925] Calcutta 48 ***(foll)***

JB Berthelsen v. Director-General of Immigration Malaysia & Ors [1987] 1 MLJ 134 ***(refd)***

Kingston - Upon Themas Royal Conder Borough Council v. Secretary of States for the Environment [1973] 1 WLR 1549 ***(refd)***

Koon Hoi Chow v. Pretam Singh [1972] 1 MLJ 180 ***(foll)***

Law Pang Ching & Ors v. Tawau Municipal Council [2002] 3 MLJ 326 ***(foll)***

Lee Kean Lum v. Penolong Pendaftar Perniagaan Utara Alor Setar [1994] 3 CLJ 278 HC ***(foll)***

Loh Wai Kong v. Government of Malaysia & Ors [1978] 2 MLJ 175 ***(foll)***

Loo Choo Teng & Anor v. Cheok Swee Lee & Ors And Another Appeal [2000] 2 CLJ 389 CA ***(foll)***

Majlis Perbandaran Seberang Perai v. Tropiland Sdn Bhd [1996] 3 CLJ 837 CA ***(foll)***

Mansor Mat Tahir v. Kadi Daerah Pendang, Kedah & Anor [1988] 1 CLJ 763; [1988] 1 CLJ (Rep) 796 HC ***(foll)***

Md Aris Zainal Abidin v. Suruhanjaya Pasukan Polis & Anor [2002] 4 CLJ 10 CA ***(refd)***

Metal Industry Employees Union v. Registrar of Trade Union [1976] 1 MLJ 220 ***(refd)***

Ng Bee v. Chairman, Town Council Kuala Pilah [1975] 1 MLJ 273 ***(foll)***

Ng Hee Thoong & Ors v. Public Bank Bhd [1995] 1 CLJ 609 CA ***(foll)***

Overseas Investment Pte Ltd v. Anthony William O'Brien [1988] 2 CLJ 238; [1988] 2 CLJ (Rep) 82 HC ***(foll)***

Pasmore & Ors v. The Oswaldtwistle Urban District Council and 1898 AC 387 ***(refd)***

Pyx Granite Co Ltd v. Ministry of Housing and Local Goverment [1958] 1 QB 554 ***(refd)***

R lwn. Secretary of States ex p Kirk Stall Valley Co Ltd [1996] 3 All ER 304 ***(refd)***

R lwn. Wear Valley DC ex p Binks [1985] 2 All ER 699 ***(refd)***

R v. Chief Immigration Officer Get Wich Air Port, ex p Kharrozi [1980] 3 All ER 373 ***(refd)***

R v. Epping and Harlow General Commissioners ex p Gold Straw [1982] 3 All ER 257 ***(refd)***

R v. Panel Om take - overs and Mergers, ex p Guniess plc [1990] 1 QB 146 ***(refd)***

R v. Secretary of State for the Home Department ex p Swati [1986] 2 All ER 717 ***(refd)***

R v. Senate of University of Aston [1969] 2 All ER 964 ***(refd)***
R v. The Brecnock and Abergavenny Canal Co 111 ER 395 ***(refd)***
Re Findlay [1985] AC 318 ***(refd)***
Saundres v. The Holborne District Boards of Works [1895] 1 QB 63 ***(refd)***
Schmidt & Anor v. Secretary of Stated for Home Affair [1969] 2 Ch 149 ***(refd)***
Semantan Estate (1952) Sdn Bhd v. Collector of Land Revenue Wilayah Persekutuan [1987] 2 CLJ 199; [1987] CLJ (Rep) 329 SC ***(foll)***
Singh [1972] 1 MLJ 180 ***(refd)***
Sunrise Sdn Bhd v. First Profile (M) Sdn Bhd [1997] 1 CLJ 529 FC ***(foll)***
The Queen v. Church Warden of All Saints, Wigan and Ors [1876] HL (E) vol 1 611 ***(refd)***
Thein Tham Seng v. United States Army Medical Research Unit & Anor [1983] 1 MLJ 97 ***(foll)***
Wilkinson v. Banking Corporation [1948] 1 KB 721 ***(foll)***
Workon Sdn Bhd v. The Director of Lands and Surverage, Sabah [1999] 4 MLJ 177 ***(foll)***

Legislation referred to:
Courts of Judicature Act 1964, s. 25
Public Authorities Protection Act 1948, s. 2(a)
Rules of the High Court 1980, O. 53 rr. 1(1)(a), 3
Specific Relief Act 1950, s. 44(1)
Street, Drainage and Building Act 1974, s. 25(1)
Town and Country Planning Act 1976, ss. 22(3), 23, 25
Uniform Building By-Laws 1984, by-laws 7(1)(a), (3), 25(1)

For the plaintiff - Chan Kok Keong; M/s Chan & Assoc
For the defendant - A Silvanathan; M/s Kean Chye & Sivalingam

Reported by Suhainah Wahiduddin

JUDGMENT

VT Singham J:

By an originating summons dated 6 April 2004 (encl. 1), the plaintiff has *inter alia* applied to this court for an order of mandamus against Majlis Bandaraya Ipoh, the defendant, pursuant to s. 44(1) of the Specific Relief Act 1950 to issue the certificate of fitness to the plaintiff's shop building within 10 days from the date of the order to be made by the court.

The plaintiff has applied for the following order:

1. Defendan mengeluarkan Sijil Pendudukan seperti yang ianya patut menurut undang-undang dalam masa 10 hari dari tarikh perintah yang akan dibuat di sini;

2. Kerugian untuk ditaksirkan;

3. Ganti rugi teladan;

4. Kos, dan

By an affidavit affirmed on 5 April 2004 (encl. 2), the plaintiff has stated as follows:

(1) Saya adalah pemilik berdaftar bagi kesemua hartanah yang terletak di bawah H.S.M. 12256 Lot No. PT 496, Mukim Hulu Kinta, Daerah Kinta, Negeri Perak Darul Ridzuan ("hartanah tersebut").

(2) Defendan adalah suatu badan korporat menurut s. 13 Akta Kerajaan Tempatan 1976.

(3) Pada 23 November 1995, saya telah menyerahkan satu pelan cadangan bangunan kepada defendan untuk kelulusan bangunan. Pelan tersebut telah diluluskan oleh defendan pada 24 September 1996 melalui rujukan No. MBI/F218/160/2655/95.

(4) Pembinaan telah bermula pada Ogos 1997 dan bangunan tersebut telah disiapkan dalam Februari 1998. Bangunan ini sekarang adalah sebuah rumah kedai dengan alamat di Lot 496, Gunung Rapat New Village.

(5) Pada 14 Oktober 1998, Yap Boon Foh ("Encik Yap") seorang yang berkelayakan memohon untuk Sijil Pendudukan di bawah Undang-Undang Kecil 25(i) Bangunan Seragam 1984. Satu salinan permohonan tersebut ditunjukkan kepada saya dan ditanda sebagai eks. "AS1".

(6) Walaupun Encik Yap telah membuat perakuan bahawa bangunan tersebut telah, antara lain, disiapkan berdasarkan pelan yang telah diluluskan, defendan telah menolak dan seterusnya enggan mengeluarkan Sijil Pendudukan untuk kenikmatan hartanah-hartanah tersebut.

(7) Saya telah dinasihati oleh peguamcara saya dan sesungguhnya percaya bahawa kegagalan defendan atau dengan sengaja enggan mengeluarkan Sijil Pendudukan adalah merupakan suatu kemungkiran kewajipan. Ini telah menyebabkan suatu kehilangan dan kerugian kerana saya tidak dapat menyewakan hartanah tersebut.

(8) Tindak-tanduk defendan yang tidak wajar ini juga telah menyebabkan penderitaan dan penyeksaan mental. Berdasarkan umur saya, saya telah berhenti bekerja dan berharap untuk menikmati pendapatan daripada sewaan hartanah tersebut.

(9) Oleh itu, saya memohon perintah seperti dipohon dalam saman pemula yang difailkan di sini.

However, before considering the application (encl. 1) in the instant case, it is to be observed that the following facts are not in dispute and in order to obtain a proper perspective of the said application, it is important to set out in a chronological order the sequence of events as obtained from the relevant documents and written submissions filed by both parties and which is as follows:

A Brief Chronology of Events

	Date		Particulars
1.	24 June 1979	–	The plaintiff was registered as the owner of the shop lot, being the subject matter of the land.
2.	November 1995	–	The plaintiff submitted her building plans to the defendant, Majlis Perbandaran, for approval to rebuild her shop.
3.	3 May 1996	–	The 'Lane reserve' adjacent to the plaintiff's land was alienated by the state authority to Angkasamas Sdn. Bhd., the 2nd defendant in Civil Suit No. 22-88-97 which was filed subsequently by the plaintiff against the Majlis Bandaraya as the 1st defendant and the Angkasamas Sdn. Bhd. as 2nd defendant.
4.	23 November 1995	–	the adjoining land owner submitted its building plans to the defendant, the Majlis Bandaraya for its approval.
5.	24 September 1996	–	The plaintiff's plans were approved by the defendant, Majlis Bandaraya.
6.	24 December 1996	–	About three months later, the building plans submitted by adjoining land owner was approved by the defendant, Majlis Bandaraya
7.	April 1997	–	The plaintiff began construction of her shop.
8.	18 July 1997	–	The plaintiff filed the writ of summons *vide* Civil Suit No. 22-88-97 at the High Court Ipoh and an application for an injunction against the adjoining landowner and its contractor from

proceeding to put up a building on their land as per the plan approved by the defendant, Majlis Bandaraya.

9. 18 August 1997 – The High Court dismissed the plaintiff's application for the injunction.

10. 22 August 1997 – The plaintiff filed notice of appeal to the Court of Appeal against the decision of the High Court.

11. February 1998 – Construction of the plaintiff's shop completed.

12. 19 January 1998 – The Court of Appeal dismissed the plaintiff's appeal against the decision of the High Court (See *Ah San v. Majlis Bandaraya Ipoh & Ors* [2000] 2 CLJ 125).

13. 17 February 1998 – The plaintiff filed an application to the Federal Court for leave to appeal against the decision of the Court of Appeal.

14. 18 October 2000 – Plaintiff's application for leave was refused by the Federal Court.

In answer to the plaintiff's said application (encl. 1) and affidavit in support (encl. 2) the defendant filed an affidavit in reply (encl. 3) through their Architect of the Majlis Bandaraya on behalf of the defendant which states as follows:

(1) I am a qualified Architect at Majlis Bandaraya Ipoh and am duly authorised to make this affidavit on behalf of the defendant herein.

(2) I crave leave of this Honourable Court to refer to the affidavit of the plaintiff (encl. 2) affirmed on 5 April 2004 (hereinafter referred to as "the said affidavit") and filed herein.

(3) I am advised by the defendant's solicitors and verily believe that the plaintiff has no cause of action against the defendant and therefore this affidavit in reply is filed without prejudice to the defendant's rights to have the plaintiff's application (encl. 1) struck out.

(4) The defendant has no knowledge of the title referred to in para. 1 of the said affidavit.

(5) Paragraphs 2 and 3 of the said affidavit are admitted.

(6) As to para. 4 of the said affidavit I am advised by the defendant's solicitors and verily believe that the plaintiff had on 18 July 1997 commenced a civil suit against the defendant and 3 others in this Honourable Court being Suit No. 22-88-1997 (hereinafter referred to as "the said suit"). In the said suit, the plaintiff prayed for a declaration that the planning permission granted to the second defendant in the said suit by the first defendant (MBI) was null and void. The plaintiff also asked for an injunction to restrain the second defendant (the adjoining landowner), the third and the fourth defendants from commencing any construction works. Therefore even before the plaintiff commenced construction as stated in para. 4 of the said affidavit, the plaintiff knew that her construction would cause problems to the adjoining landowner and that the plaintiff's building plan permission would need modification.

(7) I am further advised and verily believe that despite express notices by the second defendant in the said suit, the plaintiff continued to ignore the right of the adjoining landowner and proceeded at her own peril to complete construction. I therefore verily believe that the plaintiff cannot rely on her own wrong and expect the Certificate of Fitness for Occupation to be issued as she should have submitted her planning permission for amendment.

(8) I crave leave of this Honourable Court to refer to the following documents that were filed in court by the relevant parties in the said suit. The said documents are put in a bundle annexed hereto and marked as exh. "MA1".

(1) Plaintiff's affidavit affirmed on 12 July 1997 (encl. 2). (CS. 22-88-97)

(2) First defendant's (MBI) affidavit in reply affirmed by Dato' Hj. Ahmad Salleh on 5 August 1997.

(3) Second defendant's affidavit affirmed by Oung Yew Kew on 6 August 1997.

(4) Second defendant's affidavit affirmed by Oung Yew Kew on 7 August 1997 (encl. 13).

(5) Fourth defendant's affidavit by Keong Yook Seong on 8 August 1997.

(6) First defendant's statement of defence and counterclaim dated 11 August 1997 (encl. 17).

(7) First defendant's affidavit in reply affirmed by Mohd Bakri on 19 August 1997.

(8) Second defendant's further affidavit affirmed by Oung Yew Kew on 29 August 1997.

(9) First defendant's further affidavit by Dato' Ahmad Salleh on 26 September 1997.

(10) I am advised and verily believe that:

(a) The plaintiff's affidavit (encl. 2) (CS 22-88-97) clearly shows that she knew of the adjoining landowner's rights.

(b) The photographs mentioned in paras. 4 and 5 of the further affidavit of Oung Yew Kew affirmed on 29 August 1997 (CS 22-88-97) clearly show the plaintiff's speedy attempt to construct despite having been informed of the second defendant's rights.

(c) The first defendant's further affidavit affirmed by Dato' Hj. Ahmad Salleh on 16 September 1997 clearly shows that the defendant has informed that the plaintiff should not proceed further with the construction as her construction would encroach upon the adjoining lot which has been alienated by the State.

(11) In the circumstances the plaintiff should not be entitled to the prayer for Certificate of Fitness for Occupation (OS 24-462-04) as the plaintiff chose to act to her detriment without due regard for the rights of the adjoining owner.

(12) I am further advised and verily believe that the plaintiff's application for an injunction against the adjoining landowner in the said suit was dismissed by this Honourable Court and confirmed by the Court of Appeal. I verily believe that the Federal Court has also refused the plaintiff leave to appeal.

(13) As to para. 5 of the said affidavit, I am advised and verily believe that the defendant has no knowledge of the following:

(1) that Yap Boon Foh is a qualified person approved by the defendant.

(2) the said Yap Boon Foh has submitted an application for a Certificate of Fitness for Occupation (CFO).

(14) I am advised and verily believe that the draughtsman who submitted the Form A and Form B with regard to the building permission was one K. Kasi. The defendant has no knowledge of the substitution of the draughtsman nor has the defendant consented to the same. In the

circumstances, I verily believe that the allegations by the plaintiff that the plaintiff has properly submitted an application for CFO is misconceived.

(15) As to para. 6 of the said affidavit, I am advised and I verily believe that the defendant has not rejected the application for CFO as there is no proper application in the first place and in any event for reasons stated above the CFO cannot be granted without modification of the plaintiff's building.

(16) I am further advised and verily believe that the defendant could not have issued the CFO in any event as the plaintiff's lease expired on 30 January 1999.

(17) As to paras. 7 and 8 of the said affidavit. I verily believe that the defendant has good reasons for not issuing the CFO and the defendant will deny any loss or damage suffered by the plaintiff and would aver that if there was any loss or damage at all, it was brought about by the plaintiff's own conduct.

(18) I am advised by the defendant's solicitors and verily believe that in another related matter ie, Civil Suit No. 22-88-1997, despite the defendant having served a s. 25 notice, the plaintiff in that case has refused to modify and has filed an application for an injunction to stop the defendant from carrying out demolition works and the solicitors who are acting in that case are the same solicitors acting in this case.

On the following questions raised by this court, the plaintiff's counsel submitted as follows:

Q1. What are the other remedies available to the plaintiff on the facts and circumstances in this case besides the remedies provided under s. 44 of the Specific Relief Act 1950?

A1. The plaintiff has no other specific and adequate remedy.
See: Section 44(d) of the Specific Relief Act.

Q2. Whether the facts as stated in paras. 1 to 16 of encl. 6 (defendant's written submissions) are agreed?

A2. Only the strictly factual statements as narrated by the defendant's counsel in encl. 6 are agreed, and not the self-serving comments and conclusions (mostly in bold and/or underlined) interspersed therein.

Q3. Must paras. 6 and 7 of encl. 2 (plaintiff's affidavit) be read together?

A3. No. Paragraph 6 is in compliance with s. 45 of the Specific Relief Act which requires that "Every application under s. 44 must be founded on an affidavit of the person injured, stating his right in the matter in question, his demand of justice and the denial thereof."

In addition to the denial of justice, the plaintiff has, in para. 7, set out the loss she suffered because of the defendant's breach of duty in not issuing the CFO.

Q4. When Mr Yap submitted the Form E for the Certificate of Fitness of occupation, was by-law of the Uniform Building By Laws 1984 complied with by the plaintiff?

A4. Yes. The relevant provision is by-law 7(3). When the qualified person has died, as in this case, the owner shall as soon as practicable appoint another person to act for him and to submit adequate evidence to the local authority of the circumstances. The plaintiff had appointed Mr Yap as soon as practicable to act for her previous qualified person Mr Kasi ie. The circumstances for the substitution. Contrary to the defendant's submissions, no consent or agreement by the local authority is required.

On the other hand, the defendant's counsel submitted on Question No. 4 as follows:

Q4. When Mr. Yap submitted the Form E for the Certificate of Fitness For Occupation, was by-law of the Uniform Building By-Laws 1984 complied with by the plaintiff?

By-Law 7(3) of the Uniform Building By-Laws 1984 reads as follows:

> Where any qualified person who has submitted any plan, drawing or calculation in respect of any building has died or become bankrupt or cannot be found or has been deregistered from the register or for any other reason ceased to practise, the owner or occupier shall as soon as practicable appoint another qualified person to act for him and to submit adequate evidence to the local authority of the circumstances.

A4. No evidence was ever submitted to the defendant of the circumstances seeking the substitution. Therefore there has been non-compliance with by-law 7(3) of the Uniform Building By-Laws 1984. Further when by-law 7(3) is read together with by-law 7(1)(a), it is clear that there can be no substitution without the agreement/consent of the defendant.

The acceptance of a qualified person is crucial as the Certificate of Fitness for Occupation shall only be given upon the qualified person certifying the proper construction of the subject building. See s. 25(1) Uniform Building By-Laws 1984.

Decision Of This Court

Power Of Court To Grant Specific Relief

It is trite that powers of the court to grant any specific relief is discretionary and must be exercised in accordance with sound equitable principles. (See (1) *Semantan Estate (1952) Sdn. Bhd. v. Collector of Land Revenue Wilayah Persekutuan* [1987] 2 CLJ 199; [1987] CLJ (Rep) 329 and (2) *Loo Choo Teng & Anor v. Cheok Swee Lee and 5 Ors and Anor Appeal* [2000] 2 CLJ 389). The power of the High Court to make an order compelling a public officer or a Local Authority by an order to perform his public or statutory duty is also discretionary. (See (1) *Ng Bee v. Chairman, Town Council Kuala Pilah* [1975] 1 MLJ 273, (2) *Mansor bin Mat Tahir v. Kadi Daerah Pendang, Kedah* and Anor [1988] 1 CLJ 763; [1988] 1 CLJ (Rep) 796. All the conditions as laid down in s. 44(1) of the Specific Relief Act 1950 are cumulative and must be fulfilled before the plaintiff can bring her case within the provision of the said section. (See (1) *Koon Hoi Chow v. Pretam Singh* [1972] 1 MLJ 180 at p. 181, (2) *Loh Wai Kong v. Government of Malaysia & Ors* [1978] 2 MLJ 175 at p. 176, (3) *Thein Tham Seng v. United States Army Medical Research Unit & Anor* [1983] 1 MLJ 97 and (4) *Jatindra Mohan Sen Gupta – In Re 1925 Calcutta* 48 at p. 52.

On the facts alone as raised in the affidavit (encl. 2) in support of the said application, it would appear that the plaintiff has a legal right to seek such an order as aforesaid to command the Majlis Bandaraya, Ipoh, the defendant, who has a legal and statutory duty to issue the Certificate of Fitness if all the conditions and requirements as provided under the law have been complied with by the plaintiff. (See (1) *Koon Hoi Chow v. Pertam Singh* [1972] 1 MLJ 180, (2) *Ng Bee v. Chairman Town Council, Kuala Pilah* [1975] 1 MLJ 273, Singh 1972 1 MLJ 180, (3) *Loh Wai Kong v. Government of Malaysia 7 Ors.* [1978] 2 MLJ 175, (4) *Workon Sdn. Bhd. v. The Director of Lands and Surverage, Sabah* [1999] 4 MLJ 177) and (5) *Jatindra Mohan Sen Gupta – In Re* 1925 Calcutta 48). On the other hand, it is also important to note that there are cases where a statutory body may have infringed a plaintiff's right to enjoyment and yet the plaintiff may be denied the declaratory relief sought upon settled principles which governs the exercise of Judicial discretion. One of the cases where the declaratory relief may be refused is where the plaintiff has adequate alternative remedy which he has not resorted to or refused to do so or there has been, as in the instant case, no direct refusal. (See *R v. The Brecnock and Abergavenny Canal Co.* 111 ER 395).

Procedure

As to the procedure adopted by the plaintiff, this court finds that:

(1) the application for an order of mandamus is not properly made as no leave has been obtained as provided under O. 53 r. 3 of the Rules of the High Court 1980 before applying to this court to grant the order of mandamus. (See O. 53 r. 1(1), (3) of the Rules of the High Court 1980 and s. 25 read with para. 1 of the schedule to the Courts of Judicature Act 1964. It is only appropriate to distinguish at this stage that the relief sought by the plaintiff by this said originating summons (encl. 1) is a substantive relief under the Specific Relief Act 1950 but however the leave to be obtained which is clearly spelt out in O. 53 r. 1(1) and 3 of the Rules of the High Court 1980 is procedural in nature and must be so construed and should not be mixed up. Therefore, the contention on behalf of the plaintiff that O. 53 r. 1(1) and (3) of the RHC 1980 is an inferior provision to s. 44 of the Specific Relief Act 1950 and therefore the plaintiff can proceed without having had obtained leave is misplaced. (See (1) *Chan Mun Poy v. Director of Telecomunication & Anor.* [1981] 2 MLJ 293 and (2) *Lee Kean Lum v. Penolong Pendaftar Perniagaan Utara Alor Setar* [1994] 3 CLJ 278 at p. 280 and (3) *Mansor bin Mat Tahir v. Kadi Daerah Pendang Kedah & Anor* [1988] 1 CLJ 763; [1988] 1 CLJ (Rep) 796. (See also O. 53 r. 1(a) of the High Court 1980).

This court is also satisfied that the plaintiff's redress, against the alleged refusal, omission or neglect by the defendant to issue the certificate of fitness is clearly not by way of an appeal to the Appeal Board pursuant to s. 23 of the Town and Country Planning Act 1976 but rightfully by an order of mandamus to compel the defendant, as Local Authority to perform its statutory duty but subject to leave having been obtained. The relief applied by the plaintiff is against the alleged, omission or neglect on the part of the defendant to issue the Certificate of Fitness and is not on the plans submitted for approval or against the decision of the planning Authority. (See *Corporative Retail Services Limited v. Secretary of States for the Environment* [1980] All ER 449 4 for the meaning of "refusal").

As stated above, the appeal provision under s. 23 of the Town and Country Planning Act 1976 does not apply to the refusal, omission or neglect by the defendant to issue the Certificate of Fitness for occupation under the Uniform Building By Laws 1984. Ordinarily, the plaintiff is not precluded from seeking relief in this court being an order of mandamus so long there is strict compliance with the Rules of procedure and the requirements under the Special Relief Act 1950 is satisfied. The statutory appeal provision therefore is not

applicable to the relief applied to this court by the plaintiff unless the plaintiff's grievance comes within the ambit of s. 22(3) of the Town and Country Planning Act 1976.

However, as for all equitable reliefs, mandamus is pre-eminently a discretionary remedy, it may be refused if another legal remedy is available which is equally beneficial, convenient and effective. (See (1) *Semantan Estate (1952) Sdn. Bhd. v. Collector of Land Revenue, Wilayah Persekutuan* [1987] 2 CLJ 199; [1987] CLJ (Rep) 329 and (2) *Workon Sdn. Bhd. v. The Director of Land an Serverage Sabah* [1999] 4 MLJ 177, (3) *R v. Secretary of State for the Home Department exp. Swati* [1986] 2 All ER 717, (4) *R v. Epping and Harlow General Commissioners exp. Gold Straw* [1982] 3 All ER 257). (5) (See also *R v. Chief Immigration Officer Get Wich Air Port, exp. Kharrozi* [1980] 3 All ER 373 and (6) *R v. Panel Om take – overs and Mergers, exp. Guniess PLC* [1990] 1 QB 146 at pp. 177-178).

On the other hand, even if leave was not required as contended by the learned counsel for the plaintiff and that the plaintiff is entitle to file this application under s. 44 of the Specific Act 1950 which this court is not in agreement, the plaintiff's application would still be refused on the totality of the facts, background and circumstances in the instant case, for the following reasons:

(1) the plaintiff is guilty of inordinate delay in filling this application for an order of mandamus. (See (1) *Semantan Estate (1952) Sdn. Bhd v. Collector of Land Revenue, Wilayah Persekutuan* [1987] 2 MLJ 346, (2) *Bencon Development Sdn. Bhd. v. Majlis Perbandaran Pulau Pinang* [1999] 8 CLJ 37 and (3) *Majlis Perbandaran Seberang Perai v. Tropiland Sdn. Bhd.* [1996] 3 CLJ 837). Delay is a relevant factor in proceedings for an order of mandamus "Equity aids the vigilant", and not those who sleep on their rights. *"Vigilantibus", non dormientibus jura subcnient.* (See (1) *Alor Janggus Soon Seng Trading Sdn. Bhd. Building Ors. v. Sey Hoe Sdn. Bhd. & Ors* [2005] 1 CLJ 461 and (2) *Erlanger v. New Sombrero* 3 App. Case 1218 at p. 1279.

(1A) there has been unexplained delay by the plaintiff by an affidavit or otherwise for filing this application almost about 5½ years later from the date of submitting the application Form E dated 14 October 1998 (exh. 'AS1') as attached to her affidavit (encl. 2) to the defendant. The plaintiff did not explain or disclose all the material circumstances which had resulted to the delay. The plaintiff must explain the reasons for the delay and set out all the facts and circumstances relied upon to obtain this order of mandamus against the defendant. The plaintiff's application therefore, ought to be dismissed on this score of unexplained delay alone.

(See (1) *Everscript Snack Product (M) Sdn. Bhd. & Anor v. Sweeties Food Industries Sdn. Bhd.* [1980] 2 MLJ 297 at p. 298, (2) *Habib Syed Mahmud lwn. Datuk Patinggi Haji Mohd. Taib Mahmud and Anor* [1986] 2 MLJ 198 at p. 200-201, (3) *Semantan Estate (1952) Sdn. Bhd. v. Collector of Land Revenue, Wilayah Persekutuan* [1987] 2 MLJ 346 and (4) *R v. Senate of University of Aston* [1969] 2 All ER 964 at p. 979.

(2) the application (encl. 1) against the defendant, is time barred by virtue of s. 2(a) of the Public Authorities Protection Act 1948. In order to determine, whether the application is caught by limitation under s. 2(a) of the Public Authorities Protection Act 1948, time shall start from the time, the defendant had failed to consider the application Form E dated 14 October 1998 (exh. AS1 of encl. 2) which was submitted to the defendant or arguably at the time when an application for leave is filed under O. 53 r. 1(1) & (3) of the Rules of the High Court 1980 which was not applied in the instant case. Upon considering the date as stated in the said application Form E and the provisions of s. 25(1) of the Street, Drainage and Building Act 1974, this court finds that the application is caught by the three years limitation period under s. 2(a) of the Public Authorities Protection Act 1948 and the plaintiff is barred from filing this application in court. Section 2(a) of the Public Authorities Protection Act 1948 read as follows:

> The suit, action, prosecution or proceeding shall not lie or be instituted unless it is commenced within thirty-six months next after the act, neglect or default complained of or, in the case of a continuance of injury or damage, within thirty-six months next after the ceasing thereof; …

(2A) The cases, (1) *Md. Aris bin Zainal Abidin v. Suruhanjaya Pasukan Polis and Anor* [2002] 4 CLJ 10 and (2) *Ahmad Tajuddin bin Hj. Ishak v. Suruhanjaya Pelabuhan Pulau Pinang* [1997] 2 CLJ 225 referred to by learned counsel for the plaintiff is not of much assistance to support the argument that the plaintiff is not caught by s. 2(a) of the Public Authorities Protection Act 1948 as this court is of the view that the facts and circumstances in the said two cases cited by the plaintiff counsel are poles apart and is distinguishable on its own set of facts when compared to the facts and circumstances in the instant case.

(3) the conduct of the plaintiff has been inequitable in failing to disclose to this court of the Civil Suit No. 22-88-97 filed at the High Court, Ipoh against the defendant, the Majlis Perbandaran and 3 Others, in respect of the same subject matter of the land wherein the plaintiff's application for injunction against the registered owners of the adjoining land and its

contractors from proceeding with the construction of the shop building on the land was dismissed by the High Court Ipoh on 18 August 1997 and subsequently confirmed by the Court of Appeal on 19 January 1998 (See para. 6-16 of the defendant's affidavit in reply (encl. 3)) which remains uncontradicted. The plaintiff has acted inequitably and with impunity and on the facts, she is not a person in whose favour this court ought to strain the jurisdiction that has been invoked.

(3A) on the facts and circumstances in the instant case, there has been unconscionable conduct on the part of the plaintiff. (See (1) *Fabes Merlin (M) Sdn. Bhd. & Ors v. Lye Thai Seng & Anor* [1985] 2 MLJ 280 at p. 384) and (2) *Majlis Perbandaran Seberang Perai v. Tropiland Sdn. Bhd.* [1996] 3 CLJ 837.

Failure to disclose to this court that the plaintiff's application for modification of the proposed construction of the building on her land was rejected by a letter dated 29 April 1997 by the Architect of the defendant. (See para. 5 of the affidavit affirmed on 26 September 1997 by the Mayor of Majlis Bandaraya Ipoh, exh. MA1 and attached to the defendant's (encl. 3) affidavit. He who come to do equity must disclose all the facts and background of the case which may assist the court in arriving at a just decision. (See (1) *Abdul Malik bin Abdul Majid v. Asnah bte Hamid & Anor, and Dagang bin Bachik v. Abdul Malik bin Majid* [1985] 2 MLJ 459 at 469 and (2) *Law Pang Ching & Ors. v. Tawau Municipal Council* [2002] 3 MLJ 326-335.

Failure to make on oath a full and candid disclosure of material facts is of itself a ground for refusing the relief sought in the instant case. It is undesirable that the court should consider the plaintiff's application for an order of mandamus without knowing the facts on which it is based, Lord Denning MR in *Carl-Zeiss-in Stiftung v. Herbert Smith & Co. (a firm)* [1968] 2 All ER 1002 at 1004 said: "I always like to know the facts before deciding the law".

The court may refuse to grant the order of mandamus not only upon the merits but upon some delay or staleness of the case (See *The Queen v. Church Warden of All Saints, Wigan and Ors.* [1876] HL (E) Vol. 1 611 at p. 620.

Despite the dismissal of the plaintiff's appeal by the court of appeal on 19 January 1998 against the decision of the High Court, Ipoh given on 18 August 1997, the plaintiff did not file this application (encl. 3) until 6 April 2004 despite being aware and having had the benefit of legal advise on the outcome of the decision by Court of Appeal on 19 January 1998.

The plaintiff herself is to be blamed for the limitation and the inordinate delay on her part and the defendant is not responsible for the limitation and the inordinate delay. This court cannot speculate or surmise in order to supply the deficiency. The matter must be left where it is, unexplained and in the court's view to hold otherwise in the instant case, would be inconsistent with the whole course of decision in equitable relief cases and would revolutionise the settled law in this respect.

In considering the background, facts and circumstances of the case which was canvassed at the High Court, Ipoh during the hearing of the application for injunction in Civil Suit No. 22-88-97 and clearly explained in the judgment of the High Court and confirmed by the Court of Appeal, the plaintiff still chose to file this application without having disclosed to this court the decision of the Court of Appeal which has a bearing and is directly relevant for the decision of this court in this application (encl. 1).

The plaintiff in applying for the order of mandamus must show utmost good faith and disclose all the relevant matters that would affect the court's decision either to grant or otherwise refuse the application for an order of mandamus. A court where it exercise equitable jurisdiction is a court of conscience and on the facts in the instant case, there is no reason for making the slightest concession in her favour.

The plaintiff has failed to comply with by-law 7 of the Uniform Building By Laws 1984 and the onus is on the plaintiff to have informed the defendant of the change or substitution of the architect.

There is an admission on behalf of the plaintiff that the relief sought by this application could have been included in the Civil Suit No. 22-88-97 but regrettably, the plaintiff still chose to file a separate and fresh mode of proceeding for this court to issue an order of mandamus against the defendant and this is certainly not encouraged and arguably tantamount to an abuse of the process of the court and would lead to duplicity or multiplicity of proceedings and embarrassment in the proceedings on the same subject matter of the land which has already been authoritatively decided by another court of co-ordinate jurisdiction on the injunction whose decision has been confirmed by the Court of Appeal.

The process or machinery of the court should not be used improperly or abused. It would be wrong, therefore in the view of this court for the plaintiff to divide her case up into separate compartments to suit her own convenience and motive where the relief applied in the instant case admittedly could have been included and raised as a relief in the Civil Suit No. 22-88-97 or even by an amendment where the defendant in the instant case is also the first

defendant in that civil suit which relates to the same subject matter of the said land so that the finality in litigation can be achieved at the minimum expense to the parties and bring a speedy disposal. Any two sets of proceedings in respect of the same subject matter and grievance of the plaintiff would be unnecessary and is an abuse of the process of the court and there must be some sense of finality to a judicial process.

By the notice dated 29 April 1997 as raised in para. 5 of the said affidavit affirmed on 26 July 1997 by the Mayor of the defendant, it is clear that the plaintiff's previous architect Mr. K. Kasi has in fact been informed that the proposed modification to the original plans as submitted which included as addition the side windows cannot be considered and has been rejected.

The reply and material averments affirmed on behalf of the defendant by the affidavit in reply (encl. 3) remained uncontradicted and is deemed to have been admitted. (See (1) *Alloy Automotive Sdn. Bhd. v. Perusahaan Iron Field Sdn. Bhd.* [1986] 1 MLJ 382, (2) *Overseas Investment Pte Ltd. v. Anthony William O'Brien* [1988] 2 CLJ 238; [1988] 2 CLJ (Rep) 82, (3) *Ng Hee Thoong and Ors.* v. *Public Bank Bhd*. [1995] 1 CLJ 609, (4) *Dawkins v. Prince Adward of Saxe of Wiemar* 1975-76 1 QBD 499 and (5) *Sunrise Sdn. Bhd. v. First Profile (M) Sdn. Bhd.* [1997] 1 CLJ 529.

This court declines to give its opinion on the views expressed by the High Court in Civil Suit No. 22-88-97 whether the plaintiff is entitle to damages or compensation as provided under s. 25 of the Town And Country Planning Act 1976 where the application by the plaintiff herself for the modification of the original plans as approved previously is rejected when compared to a situation where the Local Planning Authority itself had ordered the approval of a building plan to be modified to such an extend as appears to it to be necessary. This court is not required to give it's opinion for the purpose of this application which is now before this court as the trial of the Civil Suit No. 22-88-97 is pending at the High Court No. 3 and the High Court in the Civil Suit No. 22-88-97 in dismissing the plaintiff's application for the injunction has expressly left it open to the plaintiff to pursue her claim for damages and compensation as provided under the Town and Country Planning Act 1976. (See (i) *Metal Industry Employees Union v. Registrar of Trade Union* [1976] 1 MLJ 220, (2) *Saundres v. The Holborne District Board of Works* [1895] 1 QB 63, (3) *Barraclough v. Brown* [1897] AC 613, (4) *Pasmore and Ors. v. The Oswaldtwistle Urban District Council and 1898* AC 387 and (5) *Wilkinson v. Banking Corporation* [1948] 1 KB 721).

On the totality of the facts, background and circumstances of this case, and for the reasons stated as above, this court finds it is not appropriate to grant the relief sought by the plaintiff being an order of mandamus against the defendant to issue the Certificate of Fitness pursuant to the application Form E under the Uniform Building By-Laws 1984.

Observation By This Court

(1) However, by way of an observation, this court wishes to state that the Officers of the Local Authorities at the Majlis Bandaraya must act with dedication and with a proper sense of responsibility when carrying out their statutory duties and be sensitive to owners of buildings who have already been granted planning permission to put a building on their land when considering a subsequent application by an adjoining land owner for building plans to be approved.

(2) The Majlis Bandaraya as a Local Authority is under a duty to act fairly to all parties and not at their whims and fancies or for an ulterior object and in total disregard to the written law. The Officers of the Majlis Bandaraya must act in accordance with natural justice, equity and good conscience in the performance of their statutory duty under the Local Government Act and subsidiary Legislations. (See (i) *Pyx Granite Co. Limited v. Ministry of Housing and Local Government* [1958] 1 QB 554 at p. 572, (2) *Holl and Co. Limited v. Shoreham by-sea Urban District Council* [1964] 1 WLR 240 and (3) *Kingston – Upon Themas Royal Conder Borough Council v. Secretary of States for the Environment* [1973] 1 WLR 1549 at p. 1553).

(3) Rate payers have a legitimate expectation that the Local Authorities will act fairly, and not arbitrarily and not inconsistently towards them so as not to have a discriminatory effect upon any of them if it is found that it is accompanied by an element of unfairness or infringement of a land owner's right. (See (1) *Schmidt & Anor v. Secretary of Stated for Home Affair* [1969] 2 Ch 149 at p. 170, (2) *Attorney-General of Hongkong v. Ng Yuen Shiu* [1983] 2 AC 629, (3) *R lwn. Wear Valley D.C. exp. Binks* [1985] 2 All ER 699, (4) *J.B. Berthelsen v. Director-General of Immigration Malaysia & Ors* [1987] 1 MLJ 134, (5) *R lwn. Secretary of States exp. Kirk Stall Valley Co. Limited* [1996] 3 All ER 304 and (6) *Re Findlay* [1985] AC 318 at p. 338).

(4) It is of the utmost importance that Officers of Local Authorities should not be encouraged to omit or neglect the fulfilment of their statutory duties, in the expectation that their neglect, omission, or delay will be condoned and their demands conceded. As observed by His Lordship, Dato' PS Gill in the Civil Suit No. 22-88-97 and graciously conceded by learned counsel for the defendant in that Civil Suit, where it is stated, "Majlis Perbandaran should have been aware of the previous planning permission given to the plaintiff which may be infringed by the planning permission and subsequently given to the 2nd defendant (Angkasamas Sdn. Bhd.)", the adjoining land owner. It is important to state that the observation of this court is confined only to the said statement of His Lordship where it was conceded by learned counsel for the defendant in that civil suit and also considered by the Court of Appeal.

Be that as it may, having considered the affidavits, written and oral submissions and the authorities including the relevant statutes, the back ground of the case as submitted by both parties and having had viewed the whole scenario in its proper perspective, this court is of the view that on the facts in the instant case and for the reasons stated as above, it does not justify granting, the order of mandamus against the defendant to issue the Certificate of Fitness and the application (encl. 1) ought to be dismissed. Accordingly, the originating summons (encl. 1) against defendant is dismissed with costs.